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CHAPTER 9

Diplomatic Relations, Succession, Continuity of States, and Other Statehood Issues

A. DIPLOMATIC RELATIONS

After the United States suspended operations of its embassy in Bangui, Central African Republic, France agreed in April 2013 to represent the United States in the Central African Republic and protect United States interests in accordance with Article 45(c) of the Vienna Convention on Diplomatic Relations. See *Digest 2011* at 271 for a list of other governments that have served as protecting powers for the United States.

B. STATUS ISSUES

1. U.S. Recognition of Somalia

On January 17, 2013, U.S. Secretary of State Hillary Rodham Clinton received the president of Somalia, Hassan Sheikh Mohamud, at the U.S. Department of State. The Somali president traveled with a delegation from the new Somali government to meet with several U.S. government officials and for the announcement that the United States recognizes the government of Somalia for the first time since 1991. A State Department media note, available at *www.state.gov/r/pa/prs/ps/2013/01/202997.htm*, and excerpted below, summarizes the changes in Somalia leading up to the U.S. decision to recognize its government.

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In 2012, after more than a decade of transitional governments, Somalia completed its political transition process. This culminated in a new provisional constitution, a new parliament, and the election by that parliament of Mr. Hassan Sheikh as Somalia's president. In recognizing the Government of Somalia, the United States is committing to sustained diplomatic engagement

with the Somali authorities. While we maintain responsibility for U.S. engagement in Somalia through our personnel in the Somalia Unit, led by Special Representative for Somalia, James Swan, and co-located with the U.S. Embassy in Nairobi, Kenya, we have increased our travel to Somalia over the last six months and plan to establish an even more robust presence there as security permits. In addition, recognition removes an obstacle to Somali participation in certain foreign assistance programs, including security sector programs like International Military and Education Training and Foreign Military Financing.

* * * *

Somalia's long road to representative and accountable government has not ended. We applaud President Hassan Sheikh's commitment to inclusive governance and call on Somalia's new leaders to continue the reform effort and work together to create a better future for all Somalis. We will continue to help the new government strengthen democratic institutions, improve stability and security, and improve its ability to provide services to its citizens.

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Secretary Clinton's remarks with President Mohamud after their meeting on January 17, 2013 are excerpted below and available in full at *www.state.gov/secretary/20092013clinton/rm/2013/01/202998.htm*.

* * * *

… Today's meeting has been a long time in the making. Four years ago, at the start of the Obama Administration, Somalia was, in many ways, a different country than it is today. The people and leaders of Somalia have fought and sacrificed to bring greater stability, security, and peace to their nation.

There is still a long way to go and many challenges to confront, but we have seen a new foundation for that better future being laid. And today, we are taking an important step toward that future. I am delighted to announce that for the first time since 1991, the United States is recognizing the Government of Somalia.

Now before I talk about what comes next for this partnership, it is worth taking a moment to remember how we got here and how far we have come together. When I entered the State Department in January 2009, al-Shabaab controlled most of Mogadishu and south and central Somalia. It looked at the time like it would even gain more territory. The people of Somalia had already endured many years of violence and isolation, and we wanted to change that. We wanted to work together, not only with the people of Somalia but with governments across the region, the international community, and other likeminded friends.

In early 2009, the final Transitional Federal Government began its work. Somali security forces, supported by the African Union Mission in Somalia, and troops from Uganda and Burundi and now Kenya and Djibouti began to drive al-Shabaab out of cities and towns. Humanitarian aid finally began getting to the people in need. Local governments resumed their work. Commerce and travel began to pick up. Now progress was halting at times, but it was unmistakable. And today, thanks to the extraordinary partnership between the leaders and people

of Somalia, with international supporters, al-Shabaab has been driven from Mogadishu and every other major city in Somalia.

While this fight was going on, at the same time, Somalia's leaders worked to create a functioning democratic government. Now that process, too, was quite challenging. But today, for the first time in two decades, this country has a representative government with a new president, a new parliament, a new prime minister, and a new constitution. Somalia's leaders are well aware of the work that lies ahead of them, and that it will be hard work. But they have entered into this important mission with a level of commitment that we find admirable.

So Somalia has the chance to write a new chapter. When Assistant Secretary Carson visited Mogadishu in June, the first U.S. Assistant Secretary to do so in more than 20 years, and when Under Secretary Sherman visited a few months ago, they discovered a new sense of optimism and opportunity. Now we want to translate that into lasting progress.

Somalia's transformation was achieved first and foremost by the people and leaders of Somalia, backed by strong, African-led support. We also want to thank the African Union, which deserves a great deal of credit for Somalia's success. The United States was proud to support this effort. We provided more than $650 million in assistance to the African Union Mission in Somalia, more than 130 million to Somalia's security forces. In the past two years, we've given nearly $360 million in emergency humanitarian assistance and more than $45 million in development-related assistance to help rebuild Somalia's economy. And we have provided more than $200 million throughout the Horn of Africa for Somali refugee assistance.

We've also concentrated a lot of our diplomacy on supporting democratic progress. And this has been a personal priority for me during my time as Secretary, so I'm very pleased that in my last weeks here, Mr. President, we're taking this historic step of recognizing the government.

Now, we will continue to work closely, and the President and I had a chance to discuss in detail some of the work that lies ahead and what the government and people of Somalia are asking of the United States now. Our diplomats, our development experts are traveling more frequently there, and I do look forward to the day when we can reestablish a permanent U.S. diplomatic presence in Mogadishu.

We will also continue, as we well know, to face the threat of terrorism and violent extremism. It is not just a problem in Somalia; it is a problem across the region. The terrorists, as we have learned once again in the last days, are not resting, and neither will we. We will be very clear-eyed and realistic about the threat they continue to pose. We have particular concerns about the dangers facing displaced people, especially women, who continue to be vulnerable to violence, rape, and exploitation.

So today is a milestone. It's not the end of the journey but it's an important milestone to that end. We respect the sovereignty of Somalia, and as two sovereign nations we will continue to have an open, transparent dialogue about what more we can do to help the people of Somalia realize their own dreams.

The President had a chance to meet President Obama earlier today at the White House, and that was a very strong signal to the people of Somalia of our continuing support and commitment. So as you, Mr. President, and your leaders work to build democratic institutions, protect human rights and fundamental freedoms, respond to humanitarian needs, build the economy, please know that the United States will be a steadfast partner with you every step of the way. Thank you.

* * * *

Also on January 17, Secretary Clinton and President Mohamud exchanged letters regarding the arrangements for the conduct of relations between the United States and Somalia. That exchange of letters appears below (with the Secretary of State's letter first) and is also available at www.state.gov/s/l/c8183.htm.

* * * *

Dear Mr. President:

On behalf of the Government of the United States of America, I congratulate the people of Somalia on their success in establishing a new Government of Somalia. The United States of America is pleased to recognize your government, upon confirmation of the following arrangements for the conduct of relations between the United States of America and Somalia.

First, recalling Somalia's existing legal obligations to the United States of America, including existing bilateral and multilateral treaty obligations and financial obligations to the United States of America, such as those that relate to the conduct of diplomatic and consular relations and those outlined under the Agreement effected by exchange of notes dated August 22, 1980, and the Agreement on Economic and Technical Cooperation, effected by exchange of notes dated June 14, October 12 and 13, 1981, I seek your commitment to work with the Government of the United States of America to fulfill these obligations. The United States of America is, of course, prepared to review any such treaties to determine whether they should be revised, terminated, or replaced to take into account developments in U.S.-Somalia relations.

Second, I seek your confirmation that the Government of Somalia will honor the United States of America's property rights in Somalia, including continued U.S. ownership of the entire 720,000 square meter site of the former U.S. embassy in Somalia. The United States of America is prepared to honor Somalia's property rights in the United States of America, including with regard to any properties or proceeds held by the United States of America.

Third, I seek your assurances that the Government of Somalia will respect human rights in accordance with international law and ensure democratic, just, and transparent governance in Somalia. This includes protecting rights enshrined in the International Covenant on Civil and Political Rights and meeting its other obligations under international human rights law. It also includes holding free and fair elections, protecting the rights necessary to permit civil society organizations to operate, taking necessary and appropriate steps to fight corruption, and enshrining the rule of law.

Fourth, I seek your confirmation that Somalia consents to the United States of America continuing to conduct its economic, technical, and security assistance programs throughout Somalia, including those in and with Somaliland and Puntland, on the understanding that future political and constitutional arrangements will clarify the respective responsibilities of the central government and regional administrative entities.

I look forward to receiving, by reply to this note, your concurrence with these arrangements and with the continued development of cordial and productive relations between the United States of America and Somalia.

Sincerely yours,
Hillary Rodham Clinton

* * * *

Dear Madam Secretary:

On behalf of the Government of Somalia, I thank the government and people of the United States of America for the recognition of our government. I am pleased to confirm the arrangements you have proposed for the conduct of relations between the United States of America and Somalia.

First, recalling Somalia's existing legal obligations to the United States of America, including existing bilateral and multilateral treaty obligations and financial obligations to the United States of America, such as those that relate to the conduct of diplomatic and consular relations and those outlined under the Agreement effected by exchange of notes dated August 22, 1980, and the Agreement on Economic and Technical Cooperation, effected by exchange of notes dated June 14, October 12 and 13, 1981, commit to work with the Government of the United States of America to fulfill these obligations. Somalia is also prepared to review any such treaties to determine whether they should be revised, terminated, or replaced to take into account developments in U.S.-Somalia relations.

Second, I confirm that the Government of Somalia will honor the United States of America's property rights in Somalia, including continued U.S. ownership of the entire 720,000 square meter site of the former U.S. embassy in Somalia. We appreciate that the United States of America is prepared to honor Somalia's property rights in the United States of America, including with regard to any properties or proceeds held by the United States of America.

Third, I assure you that the Government of Somalia will respect human rights in accordance with international law, as well as ensure democratic, just, and transparent governance in Somalia. This includes protecting rights enshrined in the International Covenant on Civil and Political Rights and meeting its other obligations under international human rights law. It also includes holding free and fair elections, protecting the rights necessary to permit civil society organizations to operate, taking necessary and appropriate steps to fight corruption, and enshrine the rule of law.

Fourth, I also confirm that Somalia consents to the United States of America continuing to conduct its economic, technical, and security assistance programs throughout Somalia, including those in and with Somaliland and Puntland, on the understanding that future political and constitutional arrangements will clarify the respective responsibilities of the central government and regional administrative entities.

We look forward to the continued development of cordial and productive relations between Somalia and the United States of America.

Sincerely,
Hassan Sheikh Mohamud

* * * *

2. Serbia and Kosovo: EU-facilitated Dialogue

In an April 19, 2013 press statement, Secretary Kerry congratulated Serbia and Kosovo on reaching agreement in the European Union-facilitated Dialogue led by EU High Representative Catherine Ashton.[*] The statement, available at *www.state.gov/secretary/remarks/2013/04/207782.htm*, explains:

> This agreement on principles for normalization of relations required compromise and political courage from both sides, and I applaud the governments of Kosovo and Serbia for making the hard decisions that will move them closer to their goals of European integration. I encourage both countries now to implement expeditiously and fully all Dialogue agreements reached to date, so that all of those living in Kosovo and Serbia can continue to build a more peaceful and prosperous future.
>
> …
>
> The United States will remain deeply committed to seeing the people of Serbia, Kosovo, and the entire region realize their aspirations of integration into a Europe free, whole, and at peace.

On November 5, 2013, the State Department issued a press statement commending the Republic of Kosovo for elections held November 3rd. The press statement is available at *www.state.gov/r/pa/prs/ps/2013/11/217213.htm*, and includes the following:

> We applaud the commitment of both the Governments of Kosovo and Serbia to encourage voter participation and enable the people of Kosovo to democratically choose their leaders. The successful conduct of these elections is an important aspect of the implementation of the EU-facilitated Dialogue agreement to normalize relations between Kosovo and Serbia. We urge all parties to ensure the next phase of the election process is conducted in a peaceful, free and fair manner.

On November 19, 2013, Ambassador Rosemary A. DiCarlo, Deputy U.S. Permanent Representative to the United Nations, delivered remarks at a Security Council Debate on UNMIK, in which she addressed the recent elections in Kosovo, the agreement on normalizing relations with Serbia, and progress on EU integration. Ambassador DiCarlo's remarks are available at *http://usun.state.gov/briefing/statements/217752.htm* and include the following:

[*] Editor's note: The April agreement is called an "Agreement on Principles of Normalization," and is often referred to as a "normalization" agreement. However, the April 2013 agreement does not require Serbia to recognize Kosovo as an independent state or to establish diplomatic relations.

First, the United States congratulates Kosovo, the OSCE, and all the individuals and organizations that contributed to the success of the November 3rd municipal elections and applauds Kosovo and Serbia for their efforts to encourage voter participation. …These elections have demonstrated that Kosovo is capable of conducting future elections that are consistent with international standards and its European aspirations. We now look forward to the peaceful conduct of the run-off polls on December 1st.

Second, the United States supports the normalization of relations between Kosovo and Serbia, which is crucial for stability and reconciliation in the region. We are pleased by the progress both countries have made in the EU-facilitated dialogue. The municipal elections in Kosovo are just one, albeit highly vital, element of the April 19th agreement. We look to the Governments of Kosovo and Serbia to move forward with full implementation of all aspects of the April 19th agreement and all previous agreements, including integrated border management. We commend both governments for concluding additional agreements in recent weeks, particularly regarding telecommunications and energy. The Prime Ministers and EU High Representative Ashton deserve our praise and continued support for their efforts, and we also thank EULEX and NATO for their support for implementing the Dialogue agreements.

Finally, Mr. President, the United States views the elections and the progress of the dialogue as positive steps on Kosovo and Serbia's respective paths towards EU membership. We strongly support Serbia's commitment to joining the European Union and, with full implementation of the April 19th agreement, look forward to the European Council's vote on starting accession talks with Serbia. We also welcome the October 28th start of negotiations between the European Union and Kosovo on a Stabilization and Association Agreement. This milestone demonstrates the progress Kosovo has made both on internal reforms and towards normalization of relations with Serbia. So does Kosovo's growing number of recognitions, which now represent a majority of UN Member States. The United States stands ready to support Kosovo's efforts to implement the reforms necessary to achieve its Euro-Atlantic integration goals, including strengthening the rule of law and the fight against crime and corruption, the protection of minority rights, and the development of a strong market-based economy.

3. Nagorno-Karabakh

The State Department issued a press statement on November 19, 2013 welcoming the Armenia-Azerbaijan summit on Nagorno-Karabakh held that day in Vienna under the auspices of the OSCE Minsk Group co-chairs. The meeting of the presidents of Armenia and Azerbaijan on the Nagorno-Karabakh conflict was their first in almost two years. The United States serves as co-chair of the OSCE Minsk Group along with Russia and France.

The November 19 press statement is available at www.state.gov/r/pa/prs/ps/2013/11/217743.htm. On December 5, 2013, the State Department issued a media note containing the joint statement by the heads of delegation of the OSCE Minsk Group co-chair countries and the foreign ministers of Azaerbaijan and Armenia. The joint statement is available at http://www.state.gov/r/pa/prs/ps/2013/218399.htm. Included in the joint statement is the indication of continued engagement and future meetings to advance the peace process.

4. Georgia

a. Geneva Discussions

On July 4, 2013, Ambassador to the OSCE Ian Kelly delivered a statement on the 24th round of the Geneva Discussions on the conflict in Georgia. Ambassador Kelly's statement is excerpted below and available at http://osce.usmission.gov/jul_4_13_georgia.html.

* * * *

The United States was pleased to participate in the 24th round of the Geneva International Discussions on June 25 and 26. During the discussions, the United States joined the Co-Chairs and the Georgian participants in expressing deep concern over the accelerated installation of physical barriers on the administrative boundary lines (ABLs). As we noted during the talks, such "borderization" is inconsistent with Georgia's sovereignty and territorial integrity within its internationally recognized borders and is therefore contrary to customary international law, as well as the commitments made by the Russian Federation in the August 12, 2008, six-point ceasefire agreement.

We regret that some participants chose to cut short their participation in Working Group II, ending the discussion on important humanitarian issues and challenging an agreed format that has endured for almost five years. The United States continues to call on all sides to focus the discussions on substance rather than format in order to make tangible improvements to the lives of those living in the conflict-affected communities.

The United States remains committed to finding a long-term, peaceful solution to the conflict in Georgia, and reiterates its strong support for Georgia's sovereignty and territorial integrity within its internationally recognized borders. We remain convinced that the OSCE and other international actors can play a valuable role in resolving problems, providing humanitarian assistance, and monitoring human rights and humanitarian conditions. In this regard, unhindered access to the whole of Georgia is essential.

We appreciate the ongoing efforts of the Geneva Co-Chairs to facilitate progress towards these goals, and reiterate our support for the vital work of the European Union Monitoring

Mission in promoting transparency and stability along the ABLs with the Abkhazia and South Ossetia regions. We continue to value the Geneva International Discussions and their role in addressing issues of stability and security, human rights and humanitarian concerns, and the peaceful resolution of the conflict in Georgia, and look forward to working constructively on this agenda in the coming months.

* * * *

b. Georgia and Moldova Agreements with the EU

On November 29, 2013, Secretary Kerry issued a press statement congratulating Georgia and Moldova on initialing association agreements and free trade agreements with the European Union at the Eastern Partnership Summit in Vilnius. The press statement, available at *www.state.gov/secretary/remarks/2013/11/218124.htm* also includes the following expressions of U.S. support for and commitment to greater European integration of Georgia and Moldova:

> The United States strongly supports the integration of Georgia and Moldova into the Euro-Atlantic community, which will spur greater economic opportunity, development and prosperity across the continent.
>
> We commend Georgia and Moldova for strengthening the rule of law, democracy, and free markets. Meeting the goals of the EU's Eastern Partnership program is one of the surest paths to a Europe whole, free and at peace.
>
> We reaffirm our commitment to deepening our partnership with the people of Georgia and Moldova, and we will continue to support their governments as they lay the groundwork for greater European integration and a better, more prosperous future.

C. EXECUTIVE BRANCH AUTHORITY OVER FOREIGN STATE RECOGNITION

On July 23, 2013, a three judge panel of the U.S. Court of Appeals for the District of Columbia decided the case, *Zivotofsky v. Secretary of State*, 725 F.3d 197 (D.C. Cir. 2013). The case was remanded by the U.S. Supreme Court to the court of appeals in 2012 for a determination of the constitutionality of a law requiring the Department of State to record "Israel" as the place of birth for a U.S. citizen born in Jerusalem upon request of that citizen. For prior developments in the case, see *Digest 2006* at 530-47, *Digest 2007* at 437-43, *Digest 2008* at 447-54, *Digest 2009* at 303-10, *Digest 2011* at 278-82, and *Digest 2012* at 283-86. On remand, the court of appeals struck down the provision as unconstitutional, reasoning that it infringes on the exclusive authority of the executive branch to determine which states, governments, and sovereign territories the United States recognizes. Excerpts follow from the opinion of the majority of the

appeals court (with footnotes omitted). One of the three judges wrote a separate concurring opinion. On November 20, 2013, a petition for writ of certiorari was filed.[**]

* * * *

Section 214(d) of the Foreign Relations Authorization Act, Fiscal Year 2003, Pub.L. No. 107–228, 116 Stat. 1350, requires the Secretary (Secretary) of the United States Department of State (State Department) to record "Israel" as the place of birth on the passport of a United States citizen born in Jerusalem if the citizen or his guardian so requests. *Id.* § 214(d), 116 Stat. at 1366. The Secretary has not enforced the provision, believing that it impermissibly intrudes on the President's exclusive authority under the United States Constitution to decide whether and on what terms to recognize foreign nations. We agree and therefore hold that section 214(d) is unconstitutional.

* * * *

A. The Recognition Power

Recognition is the act by which "a state commits itself to treat an entity as a state or to treat a regime as the government of a state." RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 94(1). "The rights and attributes of sovereignty belong to [a state] independently of all recognition, but it is only after it has been recognized that it is assured of exercising them." 1 John Bassett Moore, *A Digest of International Law* § 27, at 72 (1906) (MOORE'S INT'L LAW DIGEST). Recognition is therefore a critical step in establishing diplomatic relations with the United States; if the United States does not recognize a state, it means the United States is "unwilling[ ] to acknowledge that the government in question speaks as the sovereign authority for the territory it purports to control." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964). Recognition also confers other substantial benefits. For example, a recognized sovereign generally may (1) maintain a suit in a United States court, *see id.* at 408–09, 84 S.Ct. 923; *Guaranty Trust Co. v. United States*, 304 U.S. 126, 137, 58 S.Ct. 785, 82 L.Ed. 1224 (1938); (2) assert the sovereign immunity defense in a United States court, *see Nat'l City Bank v. Republic of China*, 348 U.S. 356, 359, 75 S.Ct. 423, 99 L.Ed. 389 (1955); and (3) benefit from the "act of state" doctrine, which provides that "[e]very sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory," *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 303, 38 S.Ct. 309, 62 L.Ed. 726 (1918) (quotation marks omitted).

A government typically recognizes a foreign state by "written or oral declaration." 1 MOORE'S INT'L LAW DIGEST § 27, at 73. Recognition may also be implied as "when a [recognizing] state enters into negotiations with the new state, sends it diplomatic agents, receives such agents officially, gives exequaturs to its consuls, [and] forms with it conventional relations." *Id.; see also* David Gray Adler, *The President's Recognition Power, reprinted in The Constitution and the Conduct of American Foreign Policy* 133 (David Gray Adler & Larry N. George eds., 1996) ("At international law, the act of receiving an ambassador of a foreign

[**] Editor's note: On April 21, 2014, the Supreme Court granted the petition for certiorari.

government entails certain legal consequences. The reception of an ambassador constitutes a formal recognition of the sovereignty of the state or government represented.").

As noted earlier, the Supreme Court has directed us to examine the "textual, structural, and historical evidence" the parties have marshaled regarding "the nature ... of the passport and recognition powers." *Zivotofsky V*, 132 S.Ct. at 1430. We first address the recognition power and, in particular, whether the power is held exclusively by the President.

B. The President and the Recognition Power

Text and Originalist Evidence

Neither the text of the Constitution nor originalist evidence provides much help in answering the question of the scope of the President's recognition power. In support of his view that the recognition power lies exclusively with the President, the Secretary cites the "receive ambassadors" clause of Article II, Section 3 of the Constitution, which provides, *inter alia,* that the President "shall receive Ambassadors and other public Ministers." U.S. CONST., art. II, § 3. But the fact that the President is empowered to receive ambassadors, by itself, does not resolve whether he has the exclusive authority to recognize foreign nations. Some scholars have suggested other constitutional provisions as possible sources of authority for the President to exercise the recognition power but conclude that the text of those provisions does not itself resolve the issue.

Originalist evidence also fails to clarify the Constitution's text. …

* * * *

Post-ratification History

Both parties make extensive arguments regarding the post-ratification recognition history of the United States. As the Supreme Court has explained, longstanding and consistent post-ratification practice is evidence of constitutional meaning. ...We conclude that longstanding post-ratification practice supports the Secretary's position that the President exclusively holds the recognition power.

Beginning with the administration of our first President, George Washington, the Executive has believed that it has the exclusive power to recognize foreign nations. In 1793, President Washington's cabinet unanimously concluded that Washington need not consult with the Congress before receiving the minister from France's post-revolutionary government, notwithstanding his receiving the minister recognized the new government by implication. Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power Over Foreign Affairs,* 111 YALE L.J. 231, 312 (2001). Nor did the Congress "purport[ ] to tell Washington which countries or governments to recognize." *Id.* at 312–13. The Washington administration also took sole control of issuing exequaturs to foreign consuls. *Id.* at 313 (President Washington "not only signed exequaturs, he also set policy respecting their issuance" (footnote omitted))…

In 1817, President James Monroe prevailed in a standoff with Speaker of the House Henry Clay over the recognition power. Clay had announced that he "intended moving the recognition of Buenos Ayres and probably of Chile." Julius Goebel, Jr. *The Recognition Policy of the United States* 121 (1915). But when Clay attempted to amend an appropriations bill to appropriate $18,000 for an American minister to be sent to South America, *id.* at 123–24, he was forced to modify the amendment to manifest that the decision whether to send the minister belonged to the President, *see* 32 ANNALS OF CONGRESS 1498–1500 (1818). And, in fact, even Clay's weakened amendment was defeated in the House; "the reason for the defeat appears

to have been that the amendment was interfering with the functions of the executive." *Goebel, supra*, at 124; *see also* 32 ANNALS OF CONG. 1538 (1818) (statement of Rep. Smith) ("The Constitution has given ... to the President the direction of our intercourse with foreign nations. It is not wise for us to interfere with his powers...."); *id.* at 1570 (statement of Rep. Smyth) ("[T]he acknowledgement of the independence of a new Power is an exercise of Executive authority; consequently, for Congress to direct the Executive how he shall exercise this power, is an act of usurpation."). According to Goebel, Clay's defeat "meant a great increase of strength for the administration" because "it had received a direct confirmation of its ultimate right to determine whether a government was to be recognized." *Goebel, supra*, at 124.

In 1864 and, again, 1896, the Executive branch challenged the individual houses of the Congress for intruding into the realm of recognition, which eventually led the Congress to refrain from acting. In 1864, the House passed a resolution asserting that it did not acknowledge Archduke Ferdinand Maximilian von Habsburg as the Emperor of Mexico. CONG. GLOBE, 38TH CONG., 1ST SESS. 1408 (1864). The then-Secretary wrote to the United States Minister to France, stating that the recognition authority is "purely executive," belonging "not to the House of Representatives, nor even to Congress, but to the President." *Id.* at 2475. The Senate ultimately did not act on the bill. In 1896, the Senate Foreign Relations Committee presented a joint resolution to the full Senate purporting to recognize Cuba's independence. 29 CONG. REC. 326, 332 (1896). The then-Secretary responded with a statement that the power to "recognize the so-called Republic of Cuba as an independent State rests solely with the Executive"; a joint resolution would have only "advice of great weight." Eugene V. Rostow, *Great Cases Make Bad Law: The War Powers Act*, 50 TEX. L.REV. 866–67 (1972) (quotation marks omitted)…. Again, the Senate did not act on the proposed joint resolution.

In 1919, the Congress once again relented in response to the President's assertion of exclusive recognition power. That year, the Senate considered a resolution which recommended withdrawing recognition of the then-existing Mexican government. PRELIM. REPORT & HR'GS OF THE SEN. COMM. ON FOREIGN RELATIONS, INVESTIGATION OF MEXICAN AFFAIRS, S. DOC. NO.. 66–285, at 843D (2d. Sess.1919–20). In response, President Woodrow Wilson informed the Congress that the resolution, if enacted, would "constitute a reversal of our constitutional practice which might lead to very grave confusion in regard to the guidance of our foreign affairs" because "the initiative in directing the relations of our Government with foreign governments is assigned by the Constitution to the Executive, and to the Executive, only." *Id.* "Within half an hour of the letter's receipt[,] Senator Lodge, Chairman of the Foreign Relations Committee, announced that the [ ] resolution was dead. President Wilson, Mr. Lodge said, must now accept entire responsibility for Mexican relations." Wilson Rebuffs Senate on Mexico, N.Y. TIMES, Dec. 8, 1919, *available at* http://query.nytimes.com/gst/abstract.html?res=9C00E2DD123BEE32A2575AC0A9649D946896D6CF.

Zivotofsky marshals several isolated events in support of his position that the recognition power does not repose solely in the Executive but they are unconvincing. First, Zivotofsky argues that in 1898 the Senate passed a joint resolution stating "the Government of the United States hereby recognizes the Republic of Cuba as the true and lawful Government of that Island." Br. for Appellant 42. But review of the Congressional Record shows that the quoted language was not included in the joint resolution; rather, it was included in a *proposed* joint resolution in the Senate. *See* 31 CONG. REC. 3988 (1898). And the proposed resolution raised separation-of-powers concerns with many Senators. *See id.* at 3990 (statement of Sen. Gorman) ("I regret

exceedingly ... for the first time in the history of the country, this great body should incorporate ... a power which has been disputed by every Executive from Washington down—the right of Congress by law to provide for the recognition of a state."); *id.* at 3991 (statement of Sen. Allison (calling amendment "contravention of ... well-settled principles" and Executive "alone can deal with this question in its final aspects")); *id.* at 3991–92 (statement of Sen. Aldrich) ("We have no right at such a time to exercise functions that belong to the Executive."). When the House received the proposed joint resolution, it removed the recognition clause. *See id.* at 4080. The joint resolution,as passed, stated only that "the people" of Cuba were "free and independent." *See* 30 Stat. 738 (Apr. 20, 1898.

Zivotofsky also relies on events that occurred during the administrations of President Andrew Jackson and President Abraham Lincoln. In both instances, however, the Congress did not attempt to exercise the recognition power. Instead, it authorized appropriations to be used by the President to dispatch diplomatic representatives. In 1836, President Jackson expressed a desire to "unite" with the Congress before recognizing Texas as independent from Mexico. MESSAGE FROM THE PRESIDENT OF THE UNITED STATES UPON THE SUBJECT OF THE POLITICAL, MILITARY, AND CIVIL CONDITION OF TEXAS, H.R. DOC. NO.. 24–35, at 4 (2d Sess.1836). But in doing so, Jackson did not suggest that he lacked the exclusive recognition power. *See id.* at 2 ("[O]n the ground of expediency, I am disposed to concur, and do not, therefore, consider it necessary to express any opinion as to the strict constitutional right of the Executive, either apart from or in conjunction with the Senate, over the subject."). Rather, Jackson merely enlisted the support of the Congress as a matter of political prudence. In any event, the Congress did not attempt to exercise the recognition power on its own. Instead, the Congress appropriated funds for the President to authorize a "diplomatic agent to be sent to the Republic of Texas, whenever the President of the United States ... shall deem it expedient to appoint such minister." 5 Stat. 107 (1837). Similarly, President Lincoln expressed a desire to coordinate with the Congress by requesting that it use its appropriations authority to endorse his recognition of Liberia and Haiti. *See* Lincoln's First Annual Message to Congress (Dec. 3, 1861), *available at* http://www.presidency.ucsb.edu/ws/?pid= 29502. And the Congress subsequently did so. 12 Stat. 42.

Supreme Court Precedent

It is undisputed that "in the foreign affairs arena, the President has 'a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.' " *Clinton v. City of New York,* 524 U.S. 417, 445, 118 S.Ct. 2091, 141 L.Ed.2d 393 (1998) (quoting *United States v. Curtiss–Wright Export Corp.,* 299 U.S. 304, 320, 57 S.Ct. 216, 81 L.Ed. 255 (1936)). While the President's foreign affairs powers are not precisely defined, *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 634–35, 72 S.Ct. 863, 96 L.Ed. 1153 (1952) (Jackson, J., concurring), the courts have long recognized the President's presumptive dominance in matters abroad. *See, e.g., Am. Ins. Ass'n v. Garamendi,* 539 U.S. 396, 415, 123 S.Ct. 2374, 156 L.Ed.2d 376 (2003) ("[O]ur cases have recognized that the President has authority to make 'executive agreements' with other countries, requiring no ratification by the Senate or approval by Congress, this power having been exercised since the early years of the Republic."); *Youngstown,* 343 U.S. at 610, 72 S.Ct. 863 (President has "vast share of responsibility for the conduct of our foreign relations") (Frankfurter, J., concurring); *Johnson v. Eisentrager,* 339 U.S. 763, 789, 70 S.Ct. 936, 94 L.Ed. 1255 (1950) ("President is exclusively responsible" for "conduct of diplomatic and foreign affairs"); *Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State,* 104 F.3d 1349, 1353 (D.C.Cir.1997) ("[C]ourts have been

wary of second-guessing executive branch decision[s] involving complicated foreign policy matters."). Thus, the Court, echoing the words of then-Congressman John Marshall, has described the President as the "sole organ of the nation in its external relations, and its sole representative with foreign nations." *Curtiss–Wright*, 299 U.S. at 319, 57 S.Ct. 216 (quoting 10 ANNALS OF CONG. 613 (Mar. 7, 1800)).

The Supreme Court has more than once declared that the recognition power lies exclusively with the President. *See Williams v. Suffolk Ins. Co.*, 38 U.S. 415, 420, 13 Pet. 415, 10 L.Ed. 226 (1839) ("[If] the executive branch ... assume[s] a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial department[.]"); *United States v. Belmont*, 301 U.S. 324, 330, 57 S.Ct. 758, 81 L.Ed. 1134 (1937) ("[T]he Executive had authority to speak as the sole organ of th[e] government" in matters of "recognition, establishment of diplomatic relations, the assignment, and agreements with respect thereto...."); *Guaranty Trust Co. v. United States*, 304 U.S. 126, 138, 58 S.Ct. 785, 82 L.Ed. 1224 (1938) ("We accept as conclusive here the determination of our own State Department that the Russian State was represented by the Provisional Government...."); *United States v. Pink*, 315 U.S. 203, 229, 62 S.Ct. 552, 86 L.Ed. 796 (1942) ("The powers of the President in the conduct of foreign relations included the power, without consent of the Senate, to determine the public policy of the United States with respect to the Russian nationalization decrees.... [including t]h[e] authority ... [to determine] the government to be recognized."); *Baker v. Carr*, 369 U.S. 186, 213, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962) ("[I]t is the executive that determines a person's status as representative of a foreign government."); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964) ("Political recognition is exclusively a function of the Executive."). To be sure, the Court has not *held* that the President exclusively holds the power. But, for us—an inferior court—"carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative," *United States v. Dorcely*, 454 F.3d 366, 375 (D.C.Cir.2006) (quotation marks omitted); *see also Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399, 5 L.Ed. 257 (1821) (Marshall, C.J.), especially if the Supreme Court has repeated the dictum, *see Overby v. Nat'l Ass'n of Letter Carriers*, 595 F.3d 1290, 1295 (D.C.Cir.2010) (Supreme Court dictum is "especially" authoritative if "the Supreme Court has reiterated the same teaching").

In *Williams v. Suffolk Insurance Company*, the issue before the Court was whether "the Falkland islands ... constitute any part of the dominions within the sovereignty of the government of Buenos Ayres." 38 U.S. at 419. The Court decided that the President's action in the matter was "conclusive on the judicial department." *Id.* at 420.

> And can there be any doubt, that when the executive branch of the government, which is charged with our foreign relations, shall in its correspondence with a foreign nation assume a fact in regard to the sovereignty of any island or country, it is conclusive on the judicial department? And in this view it is not material to inquire, nor is it the province of the Court to determine, whether the executive be right or wrong. It is enough to know, that in the exercise of his constitutional functions, he has decided the question. Having done this under the responsibilities which belong to him, it is obligatory on the people and government of the Union.

Id. Similarly, in *Banco Nacional de Cuba v. Sabbatino*, without determining whether the United States had de-recognized Cuba's government under Fidel Castro, the Court explained that

"[p]olitical recognition is exclusively a function of the Executive." 376 U.S. at 410, 84 S.Ct. 923. The Court emphasized that were it to decide for itself whether Cuba had been de-recognized, there would be a real "possibility of embarrassment to the Executive Branch in handling foreign relations." *Id.* at 412, 84 S.Ct. 923.

President Franklin D. Roosevelt's 1933 recognition of the Soviet Union led to three cases supporting the conclusion that the President exclusively holds the recognition power. *Belmont*, 301 U.S. 324, 57 S.Ct. 758; *Guaranty Trust*, 304 U.S. 126, 58 S.Ct. 785; *Pink*, 315 U.S. 203, 62 S.Ct. 552. On November 16, 1933, the United States recognized the Soviet Union as the government of Russia "and as an incident to that recognition accepted an assignment (known as the Litvinov Assignment) of certain claims." *Pink*, 315 U.S. at 211, 62 S.Ct. 552. Under the Litvinov Assignment, the Soviet Union agreed to "take no steps to enforce claims against American nationals; but all such claims were released and assigned to the United States." *Belmont*, 301 U.S. at 326, 57 S.Ct. 758. When the United States sought to collect on the assigned claims, its action spawned litigation resulting in the three cases.

In *Belmont*, the Court held that New York State's conflicting public policy did not prevent the United States from collecting assets assigned by the Litvinov Assignment. *Id.* at 330, 57 S.Ct. 758. It noted that "who is the sovereign of a territory is not a judicial question, but one the determination of which by the *political departments* conclusively binds the courts." *Id.* at 328, 57 S.Ct. 758 (emphasis added). But the Court then more specifically explained that "recognition, establishment of diplomatic relations, the assignment, and agreements with respect thereto, were all parts of one transaction" and plainly "within the competence *of the President.*" *Id.* at 330, 57 S.Ct. 758 (emphasis added). Moreover, "in respect of what was done here, the *Executive had authority to speak as the sole organ of that government.* The assignment and the agreements in connection therewith *did not, as in the case of treaties, ... require the advice and consent of the Senate.*" *Id.* (emphases added). In other words, the Court not only emphasized the President's exclusive recognition power but also distinguished it from the *shared* treaty power.

In *Guaranty Trust*, the Court held that a United States claim for payment of funds held in a bank account formerly owned by Russia was barred by New York State's statute of limitations. 304 U.S. at 130, 143–44, 58 S.Ct. 785. In so doing, it relied on the Executive branch's recognition determination: which "government is to be regarded here as representative of a foreign sovereign state is a political rather than a judicial question, and is to be determined by the political department of the government.... We accept as conclusive here *the determination of our own State Department* that the Russian State was represented by the Provisional Government." *Id.* at 137–38, 58 S.Ct. 785 (emphasis added).

Finally, the Supreme Court in *Pink*, following *Belmont*, held that New York State could not "deny enforcement of a claim under the Litvinov Assignment because of an overriding [state] policy." *Pink*, 315 U.S. at 222, 62 S.Ct. 552. The Court defined the recognition power broadly and placed it in the hands of the President:

> The *powers of the President* in the conduct of foreign relations included the power, *without consent of the Senate*, to determine the public policy of the United States with respect to the Russian nationalization decrees.... That authority is not limited to a determination of the government to be recognized. It *includes the power to determine the policy which is to govern the question of recognition.* Objections to the underlying policy as well as objections to recognition are to be addressed to the political department and not to the courts....

Id. at 229, 62 S.Ct. 552 (citations omitted and emphases added).

The Court also treated the recognition power as belonging exclusively to the Executive in *Baker v. Carr.* It explained that "recognition of [a] foreign government[ ] so strongly defies judicial treatment that without *executive recognition* a foreign state has been called a republic of whose existence we know nothing." 369 U.S. at 212, 82 S.Ct. 691 (quotation marks and footnote omitted). The Court further explained that "the judiciary *ordinarily follows the executive* as to which nation has sovereignty over disputed territory" and that "it is *the executive* that determines a person's status as representative of a foreign government." *Id.* at 212–13, 82 S.Ct. 691 (emphases added).

Zivotofsky relies on *United States v. Palmer,* 16 U.S. 610, 3 Wheat. 610, 4 L.Ed. 471 (1818), where the Court stated that "the courts of the union must view [a] newly constituted government as it is viewed by the legislative and executive departments of the government of the United States." *See id.* at 643. But this observation simply means that the judiciary will not decide the question of recognition. When the High Court has discussed the recognition power with more specificity, as it did in the above-cited cases, it has not merely stated that the judiciary lacks authority to decide the issue but instead has explained that the President has the *exclusive* authority. …

Having reviewed the Constitution's text and structure, Supreme Court precedent and longstanding post-ratification history, we conclude that the President exclusively holds the power to determine whether to recognize a foreign sovereign.

C. Section 214(d) and the "Passport Power" vis-à-vis the Recognition Power

Having concluded that the President exclusively holds the recognition power, we turn to the "passport power," pursuant to which section 214(d) is alleged to have been enacted. We must decide whether the Congress validly exercised its passport power in enacting section 214(d) or whether section 214(d) "impermissibly intrudes" on the President's exclusive recognition power. *Zivotofsky V,* 132 S.Ct. at 1428.

Zivotofsky first contends that section 214(d) is a permissible exercise of the Congress's "passport power." In its remand to us, the Supreme Court directed that we examine, *inter alia,* the parties' evidence regarding "the nature of ... the passport ... power[ ]." *Id.* at 1430. Neither party has made clear the textual source of the passport power in the Constitution, suggesting that it may come from the Congress's power regarding immigration and foreign commerce. … Nonetheless, it is clear that the Congress has exercised its legislative power to address the subject of passports. It does not, however, have exclusive control over all passport matters. Rather, the Executive branch has long been involved in exercising the passport power, especially if foreign policy is implicated. *See Haig v. Agee,* 453 U.S. 280, 101 S.Ct. 2766, 69 L.Ed.2d 640 (1981). Until 1856, no passport statute existed and so "the common perception was that the issuance of a passport was committed to the sole discretion of the Executive and that the Executive would exercise this power in the interests of the national security and foreign policy of the United States." *Id.* at 293, 101 S.Ct. 2766. After the first passport law was enacted in 1856, "[t]he President and the Secretary of State consistently construed the 1856 Act to preserve their authority to withhold passports on national security and foreign policy grounds." *Id.* at 295, 101 S.Ct. 2766. And once the Congress enacted the Passport Act of 1926, each successive President interpreted the Act to give him the authority to control the issuance of passports for national security or foreign policy reasons: "Indeed, by an unbroken line of Executive Orders, regulations, instructions to consular officials, and notices to passport holders, the President and

the Department of State left no doubt that *likelihood of damage to national security or foreign policy of the United States was the single most important criterion in passport decisions.*" *Id.* at 298, 101 S.Ct. 2766 (footnotes omitted and emphasis added); *see also* 16 U.S. Op. Off. Legal Counsel 18, 23 (1992) ("Executive action to control the issuance of passports in connection with foreign affairs has never been seriously questioned.").

Zivotofsky relies on Supreme Court precedent that, he contends, shows the Executive cannot regulate passports unless the Congress has authorized him to do so. In both cases cited, the Court held that the Executive branch acted properly once the Congress had authorized it to so act. *See Haig*, 453 U.S. at 282, 289, 309, 101 S.Ct. 2766 (upholding Executive authority to revoke passport on national security and foreign policy grounds after concluding revocation was authorized by Congress); *Zemel v. Rusk*, 381 U.S. 1, 8, 85 S.Ct. 1271, 14 L.Ed.2d 179 (1965) (upholding State Department's refusal to validate passport for travel to Cuba because "the Passport Act of 1926 embodie [d] a grant of authority to the Executive" (citation omitted)). But in neither case did the Court state that the Congress's power over passports was exclusive. Indeed, in *Haig*, the Court made clear that it did *not* decide that issue. *Haig*, 453 U.S. at 289 n. 17, 101 S.Ct. 2766 ("In light of our decision on this issue, we have no occasion in this case to determine the scope of the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress...." (quotation marks omitted)). Likewise, in *Zemel*, the Court in effect rejected the dissenters' statements implying that the Congress exclusively regulates passports. 381 U.S. at 21, 85 S.Ct. 1271 (Black, J., dissenting) ("[R]egulation of passports ... is a law-making—not an executive, law-enforcing—function...."); *id.* at 29, 85 S.Ct. 1271 (Goldberg, J., dissenting) (Executive lacks "an inherent power to prohibit or impede travel by restricting the issuance of passports"). Instead, the Court emphasized that the "Congress—in giving the Executive authority over matters of foreign affairs—must of necessity paint with a brush broader than that it customarily wields in domestic areas." *Id.* at 17, 85 S.Ct. 1271. Thus, while the Congress has the power to enact passport legislation, its passport power is not exclusive. And if the Congress legislates pursuant to its non-exclusive passport power in such a way to infringe on Executive authority, the legislation presents a separation of powers problem. *See, e.g., Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, —— U.S. ——–, 130 S.Ct. 3138, 177 L.Ed.2d 706 (2010) (Sarbanes–Oxley Act's dual for-cause limitations on removal of members of financial oversight board unconstitutional on separation of powers ground); *Bowsher v. Synar*, 478 U.S. 714, 769, 106 S.Ct. 3181, 92 L.Ed.2d 583 (1986) ("[E]ven the results of the constitutional legislative process may be unconstitutional if those results are in fact destructive of the scheme of separation-of-powers.").

The question we must answer, then, is whether section 214(d)—which speaks only to passports—nonetheless interferes with the President's exclusive recognition power. Zivotofsky contends that section 214(d) causes no such interference because of its limited reach, that is, it simply regulates one detail of one limited type of passport. But the President's recognition power "is not limited to a determination of the government to be recognized"; it also "includes the power to determine the policy which is to govern the question of recognition." *Pink*, 315 U.S. at 229, 62 S.Ct. 552. Applying this rule, the *Pink* Court held that New York State policy was superseded by the Litvinov Assignment when the policy—which declined to give effect to claims under the Litvinov Assignment—"collid[ed] with and subtract[ed] from the [President's recognition] policy" by "tend[ing] to restore some of the precise impediments to friendly relations which the President intended to remove" with his recognition policy. *Id.* at 231, 62

S.Ct. 552.

With the recognition power overlay, section 214(d) is not, as Zivotofsky asserts, legislation that simply—and neutrally—regulates the form and content of a passport. Instead, as the Secretary explains, it runs headlong into a carefully calibrated and longstanding Executive branch policy of neutrality toward Jerusalem. Since 1948, American presidents have steadfastly declined to recognize any foreign nation's sovereignty over that city. The Executive branch has made clear that the status of Jerusalem must be decided not unilaterally by the United States but in the context of a settlement involving all of the relevant parties. *See supra* p. 200. The State Department [Foreign Affairs Manual or] FAM implements the Executive branch policy of neutrality by designating how a Jerusalem-born citizen's passport notes his place of birth. For an applicant like Zivotofsky, who was born in Jerusalem after 1948, the FAM is emphatic: denote the place of birth as "Jerusalem." 7 FAM 1383.5–6 (JA 115); *see also* 7 FAM 1383 Ex. 1383.1 pt. II (JA 127) (stating that "Israel" "[d]oes not include Jerusalem" and that for applicants born in "Jerusalem," "[d]o not write Israel or Jordan"). In his interrogatory responses, the Secretary explained the significance of the FAM's Jerusalem directive: "Any unilateral action by the United States that would signal, symbolically or concretely, that it recognizes that Jerusalem is a city that is located within the sovereign territory of Israel would critically compromise the ability of the United States to work with Israelis, Palestinians and others in the region to further the peace process." Def.'s Resps. to Pl.'s Interrogs. at 8–9, *Zivotofsky ex rel. Zivotofsky v. Sec'y of State,* No. 03–cv1921 (D.D.C. June 5, 2006) (JA 58–59). Furthermore, "[t]he Palestinians would view any United States change with respect to Jerusalem as an *endorsement of Israel's claim to Jerusalem* and a rejection of their own." *Id.* at 9 (JA 59) (emphasis added). Thus, "[w]ithin the framework of this highly sensitive, and potentially volatile, mix of political, juridical, and religious considerations, U.S. Presidents have consistently endeavored to maintain a strict policy of not prejudging the Jerusalem status issue and thus not engaging in official actions that *would recognize, or might be perceived as constituting recognition of,* Jerusalem as either the capital city of Israel, or as a city located within the sovereign territory of Israel." *Id.* (emphasis added). "[R]eversal of United States policy not to prejudge a central final status issue could provoke uproar throughout the Arab and Muslim world and seriously damage our relations with friendly Arab and Islamic governments, adversely affecting relations on a range of bilateral issues, including trade and treatment of Americans abroad." *Id.* at 11 (JA 61). We find the Secretary's detailed explanation of the conflict between section 214(d) and Executive recognition policy compelling, especially given "our customary policy to accord deference to the President in matters of foreign affairs." *Ameziane v. Obama,* 699 F.3d 488, 494 (D.C.Cir.2012) (quotation marks omitted); *see also Jama v. Immigration & Customs Enforcement,* 543 U.S. 335, 348, 125 S.Ct. 694, 160 L.Ed.2d 708 (2005) (noting "our customary policy of deference to the President in matters of foreign affairs" that "may implicate our relations with foreign powers ... requir[ing] consideration of changing political and economic circumstances" (quotation marks omitted)); *Rattigan v. Holder,* 689 F.3d 764, 769 (D.C.Cir.2012) (finding "the government's arguments quite powerful, especially given the deference owed the executive in cases implicating national security" (quotation marks omitted)). By attempting to alter the State Department's treatment of passport applicants born in Jerusalem, section 214(d) directly contradicts a carefully considered exercise of the Executive branch's recognition power.

Our reading of section 214(d) as an attempted legislative articulation of foreign policy is consistent with the Congress' characterization of the legislation. By its own terms, section 214 was enacted to alter United States foreign policy toward Jerusalem. The title of section 214 is

"*United States Policy* with Respect to Jerusalem as the Capital of Israel." Pub.L. No. 107–228 § 214, 116 Stat. at 1365 (emphasis added). Section 214(a) explains that "[t]he Congress maintains its commitment to relocating the United States Embassy in Israel to Jerusalem and urges the President ... to immediately begin the process of relocating the United States Embassy in Israel to Jerusalem." *Id.* § 214(a), 116 Stat. at 1365–66. The House Conference report accompanying the bill that became the Foreign Relations Authorization Act explained that section 214 "contain[ed] four provisions related to the recognition of Jerusalem as Israel's capital." H.R. Conf. Rep. 107–671 at 123 (Sept. 23, 2002). Various members of the Congress explained that the purpose of section 214(d) was to affect United States policy toward Jerusalem and Israel. …

Moreover, as the Secretary averred earlier in this litigation, the 2002 enactment of section 214 "provoked strong reaction throughout the Middle East, even though the President in his signing statement said that the provision would not be construed as mandatory and assured that 'U.S. policy regarding Jerusalem has not changed.' " Def.'s Resps. to Pl.'s Interrogs. at 9–10, *Zivotofsky ex rel. Zivotofsky v. Sec'y of State*, No. 03–cv–1921 (D.D.C. June 5, 2006) (JA 59–60). For example, various Palestinian groups issued statements asserting that section 214 "undermine[d] the role of the U.S. as a sponsor of the peace process," "undervalu[ed] ... Palestinian, Arab and Islamic rights in Jerusalem" and "rais[ed] questions about the real position of the U.S. Administration vis-à-vis Jerusalem." *Id.* at 10 (JA 60) (quotation marks omitted). As in *Pink*, the Secretary's enforcement of section 214(d) "would collide with and subtract from the [President's] policy" by "help[ing] keep alive one source of friction" between the United States and parties in conflict in the Middle East "which the policy of recognition was designed to eliminate." *Pink*, 315 U.S. at 231–32, 62 S.Ct. 552.

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Cross References

Passports, **Chapter 1.B.**
TPS status for Somalia, **Chapter 1.D.3**
ILC's draft articles on diplomatic protection, **Chapter 8.A.1.**
Somalia sanctions, **Chapter 16.A.7.d.**
Middle East peace process, **Chapter 17.A.**
Somalia, **Chapter 17.B.7.**